

BAN HIN LEE BANK BHD

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v.

APPLIED MAGNETICS (M) SDN BHD (IN LIQUIDATION)

HIGH COURT MALAYA, PULAU PINANG

b

TEE AH SING J

[COMPANIES (WINDING-UP) NO: 28-10-2000 (CT 2)]

20 MARCH 2002

COMPANY LAW: *Winding-up - Liquidator - Disposition of property - Competing claims as between secured creditors - Priorities - Employees of company - Whether to be ranked in priority over a lien holder - Companies Act 1965 ss. 236, 237 - National Land Code 1965 ss. 5, 281(1) - Employment Act 1955 s. 31*

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The liquidators of Applied Magnetics (M) Sdn Bhd ('the company') were seeking to execute a sale of the company's land in Daerah Barat Daya, Pulau Pinang ('the land') by way of private treaty, and to thereafter distribute the proceeds to the respective claimants. Competing claims, however, arose as between Malayan Banking Berhad ('MBB'), the lien holder of the land, on the one hand, and the employees of the company ('the employees') on the other. It was MBB's stand that it had priority over the proceeds, whilst the employees contended that s. 31 of the Employment Act 1955 applied to the sale thereby conferring them priority over MBB's claim. The liquidators were uncertain as to the priority to be accorded to the parties, and hence applied to the court for directions pursuant to s. 237(3) of the Companies Act 1965. The facts showed that the lien holder's caveat herein was registered without the required sanction of the State Authority, and in the event, before the learned judge, issues arose as to (i) whether the said lien holder's caveat was valid; (ii) whether MBB is a secured creditor; (iii) whether s. 31 of the Employment Act 1955 applied to the intended sale and if so, whether sums payable in priority to secured creditors thereof would include amounts payable as termination and lay-off benefits.

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Held:

[1] Pursuant to s. 281(1)(b) National Land Code, MBB had, upon the entry of the caveat, become entitled to a lien over the said land. The lien holder's caveat is valid and proper, notwithstanding the restriction in interest to which the land is subject. Hence, MBB is a secured creditor of the company. (p 8 d-g)

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- a* [2] It ought to be noted that on the land is situated the factory building in which the employees of the company were employed. It would thus be inequitable for MBB to claim that it had priority over the claim of the employees in respect of the proceeds. In any case, MBB could not claim that it had priority over the claims of the employees since there was no order of sale by the court. (p 10 d-e)
- b*
- [3] Justice demands that s. 31 of the Employment Act 1955 ought to be invoked by this court. That section must therefore apply to the sale by private treaty, and by virtue of s. 31(1) thereof, the claims of the employees of the company must rank in priority to that of MBB's. (p 11 a)
- c*
- [4] The maximum amount of claim of the employees is governed by the second proviso of s. 31(1) of the Employment Act. In the circumstances, the total amount of wages of an employee ought to be paid in priority to MBB as secured creditor shall be for any four consecutive months' work excluding termination and lay-off benefits. (p 11 b-e)
- d*

[Order accordingly]

Legislation referred to:

Companies Act 1965, ss. 236(1), (2)(c), 237(3)

Employment Act 1955, s. 31(1), (2)

- e* National Land Code, ss. 5, 281(1)(b), (2)

For the liquidator/applicant - Gerald Peter Samuel; M/s Lim Kean Siew & Co

For the Malayan Banking Bhd - Wong Chee Lin; M/s Skrine

- f* *Reported by WA Sharif*

JUDGMENT

Tee Ah Sing J:

- g* This is a notice of motion (encl. 47) by the Liquidators for Applied Magnetics (M) Sdn Bhd (In Liquidation) ("the company") for directions pursuant to s. 237(3) of the Companies Act 1965 as to the following matters:

- h* (1) Whether Malayan Banking Berhad is a secured creditor in respect of HS(D)2745, Lot PT PTBP/AL/23/80, Daerah Barat Daya, Pulau Pinang (hereinafter referred to as "the said land") pursuant to a lien by way of lien holder's caveat Bil. No. 27/95, Folio 20 dated 29 May 1995 (hereinafter referred to as "the said lien") notwithstanding the written sanction of the state authority for the creation of the said lien not being obtained.

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- (2) Whether, in the event this honourable court directs that the said lien is valid and Malayan Banking Berhad is a secured creditor and in the event the said land is sold by private treaty, that s. 31 of the Employment Act 1955 would be applicable in respect to a sale by private treaty by the liquidator. *a*
- (3) Whether in the event this honourable court directs that s. 31 of the Employment Act 1955 is applicable to a sale by private treaty, whether the sums payable in priority to a secured creditor as provided in s. 31 of the Employment Act 1955 would include the amounts payable as termination and lay-off benefits. *b*
- (4) That this honourable court do make orders consequential to the direction given above. *c*
- (5) That this honourable court do make orders in respect of costs of an incidental to this application and/or that the costs of and incidental to this application be borne and paid out of the assets of the company. *d*
- (6) That the applicants do have liberty to apply.
- (7) For such further and other relief as this honourable court deems fit.

The application is supported by the affidavit of Gan Ah Tee affirmed on 16 March 2001 (encl. 46). The relevant parts of the affidavit reads as follows: *e*

1. Saya adalah satu Pengarah KPMG Corporate Services Sdn Bhd. Saya adalah salah satu daripada pelikuidasi Applied Magnetics (M) Sdn. Bhd. (Dalam Pengulungan) (selepas ini dirujuk sebagai “Syarikat”) yang dilantik oleh Perintah Mahkamah bertarikh 16-5-2000 dalam prosiding ini. Saya adalah seorang daripada Pelikuidasi Syarikat dan telah diberikuasa untuk membuat afidavit ini oleh Encik Ng Swee Weng yang dilantik bersama dan berasingan dalam kes ini. *f*
 2. Fakta-fakta yang dideposkan di sini adalah dalam pengetahuan saya dan daripada rekod-rekod Syarikat kecuali dinyatakan sebaliknya. *g*
- LATARBELAKANG
3. Saya memohon kebenaran untuk merujuk kepada Usul yang difailkan oleh Pelikuidasi dan mengatakan bahawa niat utamanya adalah untuk memperolehi arahan daripada Mahkamah Mulia ini berkenaan dengan pengesahan lien berkenaan hartanah yang dimiliki oleh Syarikat kepada Malayan Banking Berhad (selepas ini dirujuk sebagai “Maybank”) dan juga untuk memperolehi arahan berkenaan pemakaian Seksyen 31 Akta Pekerjaan 1955 (selepas ini dirujuk sebagai “Akta tersebut”) berkenaan *h*
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- a* penjualan tanah Syarikat melalui jualan persendirian dan selanjutnya jika Seksyen 31 Akta tersebut boleh dipakai, jika faedah penamatan dan pemberhentian kerja perlu diutamakan pembayarannya di atas pegangan lien, Maybank.
- b* 4. Pelikuidasi sedang melaksanakan tugas-tugas mereka dengan menjual hartanah-hartanah boleh alih dan tidak oleh alih Syarikat dan menjelaskan pemiutang-pemiutang keutamaan dan bercagar dari segi undang-undang. Pelikuidasi telah datang ke Mahkamah Mulia dalam prosiding ini untuk arahan untuk membantu mereka dalam isu-isu undang-undang dan telah mendapatkan arahan berkenaan dengan keutamaan hutang-hutang dalam Perintah Mahkamah bertarikh 3-10-2000.
- c* LIEN
- d* 5. Syarikat telah pada tahun 1995 mendapatkan satu pinjaman daripada Maybank yang dicagar dengan mencagar satu suratan hakmilik syarikat yang dikenali sebagai HS(D)2745, Lot PT PTBP/A/23/80, Daerah Barat Daya, Pulau Pinang (selepas ini dirujuk sebagai “tanah tersebut”). Sesalinan hakmilik semetara dilampirkan di sini dan ditanda sebagai eks. “P-1”.
- e* 6. Satu kaveat pemegang lien Bil. No. 27/95, Jilid 7, Folio 26 bertarikh 29-5-1995 telah didaftarkan berkenaan suratan hakmilik tanah tersebut. Sesalinan kaveat pemegang lien dilampirkan di sini dan ditanda sebagai ekshibit “P-2”.
- f* 7. Pelikuidasi telah ambil maklum mengenai suratan hakmilik sementara kepada tanah tersebut mengandungi sekatan kepentingan berikut:
- (i) The land hereby alienated shall not be transferred, charged, leased, subleased or otherwise in any manner dealt with or disposed of without the written sanction of the State Authority.
- (ii) The land hereby alienated shall not be Subdivided.
- g* 8. Adalah telah menjadi pengetahuan Pelikuidasi bahawa tiada sanksi tulisan oleh Pihak Berkuasa Negeri telah diperolehi sebelum lien itu diwujudkan.
9. Pelikuidasi akan dalam proses menjualkan tanah tersebut, dan jika lien itu adalah sah, Pelikuidasi perlu membayar hasil jualan untuk menjelaskan hutang pemiutang bercagar, Maybank.
- h* 10. Oleh kerana ketiadaan kebenaran Pihak Berkuasa Negeri untuk lien itu, Pelikuidasi tidak pasti jika lien itu adalah sah atau tidak dan oleh itu meminta arahan Mahkamah Mulia menurut Seksyen 237(3), Akta Syarikat 1965 berkenaannya.
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ISU-ISU

11. Pelikuidasi telah dinasihatkan oleh peguamcara mereka dan sesungguhnya percaya bahawa jika atau lien itu sah atau tidak melibatkan isu-isu undang-undang dan mungkin terdapat dua interpretasi, iaitu:
 - (a) bahawa lien itu tidak sah, oleh kerana sekatan kepentingan yang dicatatkan dalam suratan hakmilik sementara mencatatkan bahawa urusan tanah yang berlainan (“otherwise in any manner dealt with”) memerlukan persetujuan bertulis Pihak Berkuasa Negeri (“written sanction of the State Authority”) dan oleh yang demikian, pewujudan lien itu adalah satu urusan yang memerlukan kebenaran bertulis dan jika tidak diperolehi, menyebabkan lien itu tidak sah dan oleh itu Maybank adalah pemiutang yang tidak dicagar, ataupun secara alternatif.
 - (b) bahawa definisi urusan dalam Seksyen 5 Kanun Tanah Negara 1965 mengecualikan apa-apa kaveat dan oleh kerana pewujudan lien itu adalah dengan kaveat pemegang lien, ianya bukan satu urusan dalam pengertian Kanun dan oleh itu sanksi bertulis Pihak Berkuasa Negeri tidak diperlukan.
12. Isu yang Pelikuidasi juga memerlukan arahan adalah mengenai soalan jika kebenaran Pihak Berkuasa Negeri diputuskan diperlukan untuk menjadikan lien itu sah, adakah Maybank dengan tidak memperolehi persetujuan tersebut akan menjadi pemiutang tidak bercagar.
13. Oleh itu Pelikuidasi menurut Seksyen 274 Akta Syarikat 1965 di sini meminta arahan Mahkamah Mulia ini untuk memastikan soalan-soalan tersebut di atas yang telah timbul dalam pergulungan syarikat Pemohon.

SEKSYEN 31 AKTA PEKERJAAN

Jualan Persendirian

14. Pelikuidasi ingin menjual tanah tersebut melalui jualan persendirian dan jika Mahkamah Mulia ini memberikan arahan bahawa lien itu yang dipegang oleh Maybank adalah sah, Pelikuidasi akan membayar hasil jualan kepada Maybank dalam penjelasan sebahagian hutang kepada mereka oleh kerana ianya dicagar.
15. Walaubagaimanapun di atas tanah tersebut terdapat bangunan kilang di mana pekerja-pekerja diupah oleh syarikat.
16. Oleh yang demikian, perhatian Pelikuidasi telah ditumpukan kepada fakta bahawa akan terdapat satu penjualan premisi di mana pekerja-pekerja Syarikat telah diupah, Seksyen 31 Akta tersebut boleh dipakai.
17. Pelikuidasi telah dinasihatkan oleh peguamcaranya dan sesungguhnya percaya bahawa terdapat dua interpretasi yang mungkin untuk Seksyen

- a* 31 Akta tersebut, iaitu:
- (a) Bahawa jika tanah tersebut dijual melalui jualan persendirian oleh itu Seksyen 31 tidak dipakai kerana ianya hanya dipakai di mana terdapat satu permohonan kepada Mahkamah untuk garnishmen atau penahanan hartanah majikan dan bukannya satu jualan; secara alternatifnya.
- b* (b) Bahawa oleh kerana fakta bahawa syarikat adalah dalam pergulungan Seksyen 31 Akta boleh dipakai.
18. Oleh itu Pelikuidasi meminta arahan Mahkamah Mulia ini untuk isu tersebut di atas.
- c*
- KEUTAMAAN FAEDAH PENAMATAN DAN PEMBERHENTIAN
19. Jikalau Mahkamah Mulia ini mengarahkan bahawa Seksyen 31 Akta tersebut adalah dipakai untuk jualan persendirian, Pelikuidasi perlu memohon di bawah Seksyen 31 Akta dan membayar keutamaan-keutamaan seperti dicatatkan dalam Seksyen tersebut.
- d*
20. Pelikuidasi telah melaksanakan semua keutamaan-keutamaan seperti dicatatkan di bawah Seksyen 292(2) Akta Syarikat 1965 dan oleh itu telah membayar semua gaji, SOCSO dan KWSP yang dihutang.
- e*
21. Pelikuidasi telah menurut Perintah Mahkamah dalam prosiding ini bertarikh 3-10-2000 memperolehi arahan bahawa faedah penamatan dan pemberhentian tidak dicagar.
22. Jikalau Mahkamah yang Mulia ini memutuskan bahwa lien adalah sah dan Seksyen 31(2) Akta tersebut terpakai ke atas penjualan triti persendirian, Pelikuidasi perlu memutuskan jikalau jumlah wang faedah penamatan dan pemberhentian perlu dibayar dengan prioriti ke atas pemiutang bercagar seperti Maybank.
- f*
23. Pelikuidasi telah dinasihatkan oleh peguamcara mereka dan sesungguhnya percaya bahawa terdapat dua interpretasi yang mungkin untuk Seksyen 31 Akta iaitu:
- g*
- (a) faedah penamatan dan pemberhentian bukannya satu keutamaan pembayarannya kepada pemiutang bercagar seperti Maybank oleh kerana definasi gaji dalam Seksyen 31(2) Akta secara spesifik pengecualian proviso kepada Seksyen 31 yang mengatakan bahawa gaji empat bulan pekerja-pekerja mempunyai keutamaan daripada satu pemiutang bercagar. Dan definasi “gaji “ di situ dikecualikan daripada definasi dalam Seksyen 31(2) akta tidak termasuk faedah penamatan dan pemberhentian, secara alternatif
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(b) bahawa definasi gaji dalam Seksyen 31(2) Akta juga merangkumi pemegang lien seperti Maybank dan oleh yang demikian faedah penamatan dan pemberhentian akan dibayar dengan prioriti ke atas pemiutang bercagar seperti Maybank.

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24. Oleh yang demikian, Pelikuidasi meminta arahan daripada Mahkamah Mulia ini untuk isu-isu tersebut di atas.

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An affidavit was affirmed by Suschieela a/p Manickavasagar on 11 April 2001 (encl. 50) on behalf of Malayan Banking Berhad ("MBB"). The relevant parts of the affidavit reads as follows:

1. Saya adalah Ketua Recovery Unit bagi Malayan Bankng Berhad ("MBB") pemiutang bagi nama di atas Applied Magnetics (M) Sdn Bhd ("syarikat") dan saya diberi kuasa untuk mengikrarkan Afidavit ini bagi pihak MBB. Kecuali dalam hal lain yang telah dinyatakan dengan jelas, saya mempunyai pengetahuan peribadi terhadap perkara yang diikrarkan di dalam ini.

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2. Saya memohon kebenaran Mahkamah Yang Mulia ini untuk merujuk kepada Notis Usul yang difailkan pada 28/3/2001 oleh Pelikuidasi Syarikat untuk arahan Mahkamah Yang Mulia ini yang Notis Usul telah diserahkan kepada peguamcara MBB Skrine. Saya juga memohon kebenaran untuk merujuk kepada Afidavit Gan Ah Tee yang telah diikrarkan pada 16/3/2001 dan difailkan di dalam ini ("Afidavit Gan").

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3. Perenggan 5 hingga 9 Afidavit Chan adalah diakui. MBB telah, pada 16/8/2000 memperolehi penghakiman terhadap Syarikat bagi jumlah RM79,093,966.52 dengan faedah ke atas jumlah RM79,092,207.77 pada kadar 1.5% setahun atas Kadar Pinjaman Asas MBB pada kiraan atas baki harian dari 18/1/2000 sehingga tarikh pembayaran akhir dan kos atas asas peguamcara dan anak guam dalam Guaman No. D3-22-205-2000 dalam Mahkamah Tinggi Kuala Lumpur. Kini dikemukakan dan ditunjukkan kepada saya ditanda sebagai Ekshibit "A-1" merupakan sesalinan Penghakiman tersebut.

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The learned counsel for the liquidators informed the court that as far as the liquidators are concerned since they are posing the questions they will not be taking any sides and will therefore rely on encl. 46.

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The learned counsel for Malayan Banking Berhad had put in a written submission. I have perused the written submission. I shall now deal with the issues raised.

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Section 5 of the National Land Code ("the NLC") defines "dealing" to mean "any transaction with respect to alienated land effected under the powers conferred by Division IV, and any like transaction effected under the conversions of any previous land law, but does not include any, caveat or prohibitory order."

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- a* I agree with the contention of the learned counsel to MBB that the lien-holders' caveat in favour of MBB is not a dealing within the meaning of the NLC.

I do agree with the contention of the learned counsel for MBB that a caveat is not a dealing but a restraint against dealings.

- b* Section 281(1) of the NLC provides that any proprietor or lessee for the time being may deposit with any other person or body, as security for a loan, his issue document of title, or as the case may be, duplicate lease; and that person or body:

- c* (a) may thereupon apply under Chapter 1 of para. 19 for the entry of a lien-holder's caveat; and

(b) shall, upon the entry of such a caveat, become entitled to a lien over the land or lease.

- d* Pursuant to s. 281(1)(b) of the NLC, MBB had, upon the entry of the caveat, become entitled to a lien over the said land. I agree with the contention of the learned counsel for MBB that the lien holder's caveat in favour of MBB is valid, notwithstanding the restriction in interest to which the land is subject.

- e* I find that the lien holders' caveat is valid and proper and so MBB is a secured creditor of the company.

Section 281(2) of the NLC reads as follows:

- f* (2) Where the holder of any lien has obtained judgment for the amount due to him thereunder, he shall be entitled to apply to the Court for and obtain forthwith, an order for the sale of the land or lease.

MBB has already obtained judgment against the company and under the NLC, MBB is required to apply for an order of sale from the court.

- g* However, the company is in liquidation and the liquidators have the powers to sell the said land by way of private treaty. Section 236(2)(c) of the Companies Act 1965 provides that the liquidators may sell the immovable and moveable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels.

- h* The pertinent parts of s. 31 of the Employment Act 1955 reads as follow:

- i* 31.(1) Where by order of a court made upon the application of any person holding a mortgage, charge, lien or decree (thereinafter referred to as "the secured creditor") or in the exercise of rights under a debenture the property of any person (thereinafter referred to as "the person liable") liable under any of the provisions of this Act to pay

the wages due to any employee or to pay money due to any sub-contractor for labour is sold, or any money due to the person liable is attached or garnished, the court or the receiver or manager shall not authorize payment of the proceeds of the sale or of the money so attached or garnished, to the secured creditor the debenture holder until the court or the receiver or manager shall have ascertained and caused to be paid, out of such proceeds or money, the wages of such employee, or the money due to any sub-contractor for labour under a contract between him and the person liable, which the person liable was liable to pay at the date of such sale, attachment or garnishment:

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Provided that this section shall only apply to the sale of a place of employment on which:

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(a) any employee to whom wages are due as aforesaid;

(b) ...

(c) ...

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was employed or worked at the time when such wages were earned or such money accrued due, and to the proceeds of the sale of any products of such place of employment and of any movable property therein used in connection with such employment and to any money due to the person liable on account of work performed by such employee or subcontractor for labour or derived from the sale of the products of such work:

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Provided further that:

(a) where the person liable is an employer the total amount of the wages of any employee to which priority over the claim of a secured creditor is given by this section shall not exceed the amount due by the employer to the employee as wages for any four consecutive months' work;

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(b) ...

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(c) ...

(2) In this section, except for the second proviso, "wages" includes termination and lay-off benefits, annual leave pay, sick leave pay, public holiday pay and maternity allowance.

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The learned counsel for MBB had submitted that in contrast with the powers given to a liquidator under s. 236(1) of the Companies Act 1965, the power of sale by way of private treaty of a liquidator is not subject to the requirement to obtain authority of the court or the committee of inspection.

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- a* And the learned counsel for MBB contended that clearly the first condition for s. 31(1) of the Employment Act 1955 to be applicable is that there must be a court order of sale made upon the application of any person holding a mortgage, charge, lien or decree or sale by a receiver and manager under a debenture. There is no mention of a sale by a liquidator in liquidation. It was thus submitted that s. 31 of the Employment Act 1955 is not applicable to sale by way of private treaty by the liquidators.

- b* I reject the aforesaid contention because if s. 31 of the Employment Act 1955 is not applicable, then s. 281(2) of the NLC should also not be applicable in respect of the sale of the said land by private treaty by the liquidators for under s. 281(2) of NLC, MBB as lien-holder has to apply for the court for an order of sale.

- c* Further, if the company was not in liquidation, then MBB would have to apply for an order of sale under s. 281(2) of the NLC in which event s. 31 of the Employment Act 1955 would be clearly applicable.

- d* Since there is no order of sale by the court MBB cannot claim that it has priority over the claims of the employees of the company. In my view it would be inequitable for MBB to claim that it has priority over the claim of the employees of the company in respect of the proceeds of sale of the said land by the liquidators way of private treaty.

- e* From the facts it is clear that on the said land is situated the factory building in which the employees of the company were employed.

- f* The first proviso of s. 31(1) of the Employee Act 1955 reads as follows:

Provided that this section shall only apply to the sale of a place of employment on which:

(a) any employee to whom wages are due as aforesaid,

- g* So I am of the view that s. 31(1) of the Employment Act 1955 is applicable.

- h* As there are competing claims between MBB and the employees of the company which is not covered by s. 236(2)(c) of the Companies Act 1965 as this section deals with sale by private treaty and not an order of sale by the court, in order to do justice I am of the view that resort should be had to invoke s. 31 of the Employment Act 1955.

- i* As such I hold that s. 31 of the Employment Act 1955 applies in respect of the sale by private treaty.

By virtue of s. 31(1) of the Employment Act 1955 the claims of the employees of the company ranks in priority to that of the claim by MBB. *a*

However the maximum amount of claim of the employees of the company is governed by the second proviso of s. 31(1) of the Employment Act 1955 which reads as follows: *b*

Provided further that:

- (a) where the person liable is an employer the total amount of the wages of any employee to which priority over the claim of a secured creditor is given by the section shall not exceed the amount due by the employer to the employee as wages for any four consecutive month's work. *c*

Section 31(2) of the Employment Act 1955 reads as follows:

- (2) In this section, except for the second proviso "wages" includes termination and lay-off benefits, annual leave pay, sick leave pay, public holiday pay and maternity allowance. *d*

Under s. 31(2) of the Employment Act 1955 in calculating the maximum amount of wages of any employee under the second proviso such wages for any four consecutive months' work shall not include termination and lay-off benefits. *e*

Thus I made a direction that the total amount of wages of any employee of the company to be paid in priority to MBB as secured creditor shall be for any four consecutive months' work excluding termination and lay-off benefits.

I also ordered that the costs of the application and costs incidental thereto be borne and paid out of the assets of the company prior to any payments ordered to be made in respect of the above payments and that the liquidators do have liberty to apply. *f*

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